QUARTERLY REPORT

October – December 2002

The Quarterly Report provides information to the Indiana State Board of Education on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676, or contact him by e-mail at <kmcdowel@doe.state.in.us>.

In this report:

THE PROTECTION OF PUPIL RIGHTS ACT

The Protection of Pupil Rights Act (PPRA), 20 U.S.C. § 1232h as implemented through 34 CFR Part 98, has a history of legislative and administrative maneuvering but has generated scant litigation. Related to a certain degree to the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g as implemented through 34 CFR Part 99, the PPRA gained some interest as a result of a much-publicized lawsuit in New Jersey as well as recent amendments to the privacy law by the No Child Left Behind Act of 2001 (NCLBA).[1] First, the amendments.

No Child Left Behind Act of 2001

The PPRA, as amended by the NCLBA, is concerned principally with the administration by a public agency that receives federal education funds of a survey (including a market survey), an analysis, or an evaluation to a student that addresses any one of the following eight protected areas:

- Political affiliations or beliefs of the student or the student's parent;
- Mental or psychological problems of the student or the student's family;
- Sex behavior or attitudes;
- Illegal, anti-social, self-incriminating, or demeaning behavior;
- Critical appraisals of other individuals with whom the responding student has a close family relationship;
- Legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers;
- Religious practices, affiliations, or beliefs of the student or the student's parent; or
- Income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program).

Local school districts, on an annual basis at the beginning of the school year,[2] are to notify parents and eligible students (those at least 18 years of age who do not require the appointment of a guardian) of a number of rights under the PPRA:

- Prior written consent of the parent or the eligible student must be obtained before the student is required to submit to a survey that implicates any of the eight (8) areas *supra*, if the survey is funded in whole or in part by U.S. Department of Education funds;

---

[1]See No Child Left Behind Act of 2001, Part F–General Education Provisions Act, Sec. 1061: Student Privacy, Parental Access to Information, and Administration of Certain Physical Examinations to Minors.

[2]School districts must also inform parents and eligible students, within a reasonable period of time, of any substantive changes made to the school district's PPRA policies.

- A parent must be notified at least annually at the beginning of the school year of the following: (1) the approximate or specific dates when the survey will occur; and (2) the right of the parent to "opt out" the student from participating.[3]
- A parent has the right to review, upon request, any instructional materials used in connection with any survey that implicates one of the eight (8) protected areas and those used in part of the educational curriculum.
- A parent has the right to inspect, upon request, a survey created by a third party before the survey is administered or distributed by a school to students.
- A parent has a right to know the school's policies and procedures for the administration of physical examinations or screenings of students.[4]
- A parent has the right to know the school's policies and procedures regarding the collection, disclosure, or use of personally identifiable information collected from students for marketing purposes.[5]

These items are general notices. The PPRA also details certain circumstances where parents must be notified directly (via U.S. mail or e-mail) of anticipated activities or surveys and provide the parents with an opportunity to "opt out" their child from participation. These specific activities or surveys include:

- The administration of any survey concerning one or more of the eight (8) protected areas, *supra*, if the survey is **not** funded in whole or in part with U.S. Department of Education funds.[6]
- Activities involving the collection, disclosure, or use of personally identifiable information (including the selling of same) collected from students for marketing purposes.
- Any non-emergency, invasive physical examination or screening that is (1) required as a condition of attendance; (2) administered by the school and scheduled by the school in advance; and (3) is not necessary to protect the immediate health and safety of the student or other students.[7]

---

[3]The right applies to surveys that implicate one of the eight (8) areas but are **not** funded in whole or in part with U.S. Department of Education funds.

[4]See, generally, I.C. 20-8.1-7 *et seq.*, which contains certain state-mandated screenings or tests (sickle cell anemia, lead poisoning, vision, audiometer, and postural defects), as well as other pertinent health measures and the consideration of religious objections.

[5]Under Indiana's Access to Public Records Act, I.C. 5-14-3-4(c)(3), a public school may not disclose to a commercial entity for commercial purposes a list of students who are enrolled in the public school so long as the school has a uniform policy that prohibits such disclosures.

[6]If the survey is funded in whole or in part with U.S. Department of Education funds, a public school district must obtain the actual consent of the parent and the "opt out" procedure is not available.

[7]This requirement is not suppose to apply to any physical examination or screening that is permitted or required by State law (see footnote 4, *supra*), including physical examinations or screenings

The Family Policy Compliance Office (FPCO) is responsible for the implementation of the PPRA as well as the FERPA. The same enforcement mechanism for FERPA is available for the PPRA as well: the termination of federal funding for a non-compliant public entity.[8] The FPCO has made available two important documents for use by school districts. One is the "PPRA Model Notice and Consent/Opt-Out for Specific Activities" Form, which includes information supplied to parents regarding a hypothetical anonymous survey on at-risk behaviors, a notification of flu shots to be given at the school, sample "opt-out" language, and a sample parental consent form for use by the parent. The other helpful document is a one-page "Model Notification of Rights Under the Protection of Pupil Rights Amendment (PPRA)."[9]

The Litigation History of the PPRA: Standardized Assessments

The litigation history of the PPRA is sparse. Although surveys have been more prominently discussed by Congress and have historically created the greatest concern among parents, the evolution of standardized assessment from a multiple choice format to a multi-format type containing constructed responses appears to have drawn the first applications of the PPRA in litigation.

It is believed that the first time the PPRA appeared in litigation in Indiana was during the 1995 attempt to enjoin the Indiana Department of Education from administration of the Indiana Statewide Testing for Educational Progress (ISTEP+). In Taxpayers Involved in Education, Inc., *et al.* v. Indiana Department of Education *et al.*, Cause No. 49D03-9509-CP-1357 (Marion County Superior Court, Room 3, November 30, 1995), the plaintiffs asserted that certain rights had been violated, including the right to

---

permitted without parental notification. Although Indiana law does mandate certain tests or screenings–and some health measures directly affect attendance–some tests or screenings are discretionary, typically triggered by individual concern expressed by a school physician or school nurse.

[8]It is noteworthy that Congress created the same administrative enforcement mechanism for PPRA as it did for FERPA. The U.S. Supreme Court determined last year in Gonzaga University v. Doe, 536 U.S. 273, 122 S. Ct. 2268 (2002) that FERPA, because of the exclusive administrative enforcement mechanism assigned to FPCO, precludes a private right of action that would be enforceable through 42 U.S.C. § 1983 with consequent damages. LeRoy S. Rooker, the Director of FPCO, has indicated he believes the Gonzaga decision would apply to the PPRA as well as the FERPA because of the similar enforcement language. See **Quarterly Report**, April-June: 2002, "Educational Records: Civil Rights and Privacy Rights." Even though the Supreme Court addressed a number of high profile, education-related cases during its last term (student drug-testing, private school vouchers), Chief Justice William H. Rehnquist reportedly told a federal judicial conference in July 2002 that Gonzaga was one of the "sleeper decisions" of 2002. ABA Law Journal, "Hearing Loss: High Court is Rolling Back Implied Rights of Action." (Feb. 2003).

[9]Both forms can be located and downloaded by visiting the FPCO's web site at http://www.ed.gov/offices/OII/fpco/ and clicking on "Hot Topics."

have access to certain portions of the test, notably the essay questions. The trial court, in denying the injunctive relief, noted that Indiana law grants the State the right to deny access to the essay questions before administration of the test.[10] During the testimony, some plaintiffs expressed concern that the essay questions might elicit information from the students in violation of the PPRA. One plaintiff testified that he considered the question "What did you do on your summer vacation?" as intrinsically invasive and violative of the federal law.

The court rejected these arguments, adding that the inclusion of short-answer and essay questions to the ISTEP+ was pursuant to legislative action (four of the plaintiffs were state legislators, and all four had voted for the law that expanded the ISTEP+). The judge also noted that the ISTEP+ was "directly related to academic instruction," which excepted the essay questions from application of Indiana's version of the PPRA.[11]

---

[10]See I.C. 5-14-3-4(b)(3).

[11]**IC 20-10.1-4-15. Access to materials relating to personal analysis, evaluation, or survey of students; consent for participation**

Sec. 15. (a) A school corporation shall make available for inspection by the parents or guardians of a student any instructional materials, including:

(1) teachers' manuals;

(2) student texts;

(3) films or other video materials;

(4) tapes; and

(5) other materials;

used in connection with a personal analysis, an evaluation, or a survey described in subsection (b).

(b) A student shall not be required to participate in a personal analysis, an evaluation, or a survey that is not directly related to academic instruction and that reveals or attempts to affect the student's attitudes, habits, traits, opinions, beliefs, or feelings concerning:

(1) political affiliations;

(2) religious beliefs or practices;

(3) mental or psychological conditions that may embarrass the student or the student's family;

(4) sexual behavior or attitudes;

(5) illegal, antisocial, self-incriminating, or demeaning behavior;

(6) critical appraisals of other individuals with whom the student has a close family relationship;

(7) legally recognized privileged or confidential relationships, including a relationship with a lawyer, minister, or physician; or

(8) income (except as required by law to determine eligibility for participation in a program or for receiving financial assistance under a program);

without the prior consent of the student (if the student is an adult or emancipated minor) or the prior written consent of the student's parent or guardian (if the student is an unemancipated minor). A parental consent form for such a personal analysis, evaluation, or survey shall accurately reflect the contents and nature of the personal analysis, evaluation, or survey.

(c) The department and the governing body shall give parents and students notice of their rights under

The PPRA also was raised in State *ex rel.* Rea v. Ohio Department of Education, 692 N.E.2d 596 (Ohio 1998), where a student sought access to certain statewide proficiency tests. The ODE would permit access but only if a non-disclosure statement were executed. Rea refused to execute the statement and was, accordingly, denied access. The Ohio Supreme Court, 4-3, found that the statewide tests were "public records" for the purpose of public access, and, because of the "tremendous implications for students who take such tests or assessments...[,]" the tests "should not be enshrouded in a cloak of secrecy, isolated from the scrutiny and oversight of the general public, concerned parents, and the students themselves." 692 N.E.2d at 602. The majority also found fault with the use of the non-disclosure statement.

> Although parents or the public could view the previously administered tests, the nondisclosure agreement effectively negated any chance that legitimate concerns could be raised through public exposure and debate. It is paramount that such tests are subjected to the keen eye of the public to ensure that the state does not stray from its duty to properly educate Ohio's citizenry.

Id., at 603. The dissent cautioned that the unrestricted use and copying of the statewide tests would "compromise the current question bank and prevent the development of new questions" because "a certain number of old test questions will always reappear on new versions" of the test. Id., at 604. This could lead to widespread cheating and undermine test security. The dissent also believed the majority exceeded the access requirements under both FERPA and the PPRA. Both federal laws require covered materials to be made "available" for *inspection*, which occurred, albeit after a non-disclosure agreement was executed. Neither federal law grants a right to obtain copies of the materials. Moreover, neither law prohibits an entity holding the materials from instituting, as a condition of access, a non-disclosure policy to which a party seeking the materials must agree. Id., at 608 (Justice Deborah L. Cook, dissenting).

The PPRA also played a role in Triplett v. Livingston County Board of Education, 967 S.W.2d 25 (Ky. App. 1997), *reh. den.* (1998), *cert. den.* 525 U.S. 1104, 119 S. Ct. 870 (1999). Triplett involved a challenge to the Kentucky statewide assessment, an assessment that employs both multiple choice items as well as open-ended responses and essay questions. The parent objected, on religious grounds, to her children taking the test. The school did permit the parent to inspect the test prior to its administration, but she was not allowed to take notes or make copies. She still refused to let her children participate. As a consequence, one child was retained in the eighth grade and the other was not permitted to graduate. The Tripletts sued, claiming violations of their rights to privacy, the free exercise of their religion, the right of parents to direct the education of their children, and due process. The Tripletts alleged violations of the PPRA. The appellate court found:

---

this section.

(d) The governing body shall enforce this section.

As added by P.L.204-1995, SEC.1.

> We find there is nothing in the exam which compels a student to reveal any type of information listed in 20 U.S.C. § 1232(h)(b) [see the eight (8) protected areas, *supra*]. A portion of the exam does include a multiple-choice student questionnaire in which the student is asked to give certain factual information about himself or herself, such as how much time he or she spends on homework each day and whether he or she attended kindergarten, but the questionnaire is prefaced by the caveat that if he or she does not feel comfortable answering any question, he or she may leave it blank. Also, certain essay questions ask that the child view a situation from his or her own perspective in responding to the question or statement. However, the child is not required to give any specific personal information proscribed by the above Act.

967 S.W.2d at 30-31. The Kentucky Court of Appeals found that the administration of the Kentucky test did not violate any state or federal constitutional provisions or laws.

When I Survey...

The only "pure" PPRA case is a relatively recent one arising out of New Jersey, although its legal significance is questionable because the combatants find themselves in the judicial equivalent of a "draw." Its legislative influence appears to be more substantial. Congress was likely aware of the facts in this case when it amended the PPRA through the NCLBA.

C.N. v. Ridgewood Board of Education, 146 F.Supp.2d 528 (D. N. J. 2001) begins with a cryptic quote:

> It is said that no good deed goes unpunished, or, at least, unlitigated.

146 F.Supp.2d at 530. This case began when it was decided to survey the student population to gain insight into their needs, attitudes, and behavior patterns. School security was one central concern. The superintendent notified all parents that the survey would be conducted, stated the reasons for the survey, indicated that it was voluntary, and noted that it would be anonymous. The survey itself did not contain a space for a student's name or a code. Students were instructed not to place their names on the survey. The survey was extensive (156 questions). It was completed by filling in circles that responded to gradations of responses ("strongly agree" to "strongly disagree"). Some of the questions did ask whether the student got along with his parents, whether it violated the student's values to engage in sexual relations as a teenager, whether the student ever stole anything from a store, gotten into trouble with the police, hit or beat up someone, or engaged in vandalism. There were other questions involving alcohol and drug use, violent or criminal behavior, and sexual activity or proclivities. Id., at 531.

The test was administered to middle school and high school students. Thereafter, plaintiffs sued the school district, arguing the survey was highly invasive of student privacy, and the school district did not adequately notify parents and students that the survey was voluntary and anonymous. The plaintiffs also

asserted the school district failed to adequately notify parents how and when the survey would be administered, how students could elect not to participate, and how non-participating students would be accommodated. Parental consent was not obtained prior to the administration, and parents were not provided with an "opt out" opportunity for their children.[12] Plaintiffs assert, in part, that the school district violated the PPRA.

The court found the parents "were given ample notice that the survey was voluntary and anonymous." The superintendent's letter to the parents emphasized the survey was voluntary and anonymous. The directions for administering the test repeated this. "Notwithstanding any subjective belief on the part of the students that the survey was mandatory, all of the objective indicia point to the administration of a voluntary and anonymous survey. Therefore, the official policy of the [School] Board was that the survey be administered voluntarily and anonymously." Id., at 533.

The school defendants asserted they were entitled to qualified immunity because their conduct in the development and administration of the survey did not violate any clearly established statutory or constitutional right, and that their actions were objectively reasonable under current federal law.

> Defendants persuasively argue that the law governing student surveys was not clearly established at the time of the alleged violation. First, the case law demonstrates that at the time the survey was administered, the question of whether the PPRA even applied to this survey was not clearly established.
>
> Courts have held that where no federal funds are used in a program, schoolchildren cannot challenge the program under the PPRA. [Citations omitted.] In this case, there is evidence that the survey was actually funded solely by the township. In addition, the [U.S.] Department of Education has yet to promulgate regulations which might explain when a survey falls under the tentacles of the PPRA.[13]
>
> Further, plaintiffs' Complaint asserts that defendants did not first obtain the written consent of the parents before administering the survey. But the PPRA calls for written parental consent only before any minor pupil can be "required" to submit to a survey. *See* 20 U.S.C. § 1232h(b). Where the survey is not "required," i.e., where it is voluntary, no written parental consent is necessary, and the PPRA is silent regarding the proper method by which students and parents are to be notified that student

---

[12]What is noticeably absent as an allegation is the failure of the school district to provide the parents with an opportunity to inspect the contents of the survey prior to its administration.

[13]Although the "tentacles of the PPRA" is not a particularly flattering description, the PPRA, as amended by the NCLBA, along with the explanatory information supplied by the FPCO, does address this concern as expressed by the court.

> participation is not "required." No rules or regulations have been promulgated which prescribe the appropriate manner in which students and parents are to be informed that the survey is voluntary. The case law on this point is similarly sparse. Therefore, it is this Court's opinion that the issue of whether the Board was required to comply with the PPRA was not clearly established at the time. Likewise, the law concerning the proper method of informing students and parents of the voluntary nature of the survey was not established clearly.[14]

Id., at 534-35. The court granted summary judgment to the school defendants.

The plaintiffs appealed. In a terse, one-sentence order, the 3rd Circuit Court of Appeals affirmed a part of the court's order, but reversed a substantial portion and remanded to the federal district court. C. N. *et al.* v. Ridgewood Board of Education *et al.*, 281 F.3d 219 (3rd Cir. 2001). Twenty-nine (29) days after the 3rd Circuit's opinion, the NCLBA of 2001 was signed into law (January 8, 2002), providing prospective guidance but not retroactive application.

The FPCO had been asked by the plaintiffs to investigate the school district's handling of the survey, but it held its investigation conclusions in abeyance until the litigation was concluded. Shortly after the 3rd Circuit issued its decision, the FPCO issued its findings, determining the school district did violate the PPRA by not being more explicit with regard to the voluntary nature of the survey. A number of students believed participation in the survey was mandatory. A school board member described the FPCO's findings as "a disgrace," asking how "you draw such sweeping conclusions from so little evidence." He also complained that the school district is being used "as a whipping boy by people who are, in my view, conservative extremists."[15]

The amendments to the PPRA have concerned some researchers. Lloyd D. Johnston, the principal investigator for the federally financed "Monitoring the Future" program designed to gauge student drug use, recently expressed such reservations. "Schools are really the best place where we get a window on what's going on in adolescents' lives," he told *Education Week*.[16] "It's just as important for parents as it is for researchers to have good information." Researchers noted the PPRA, as amended, distinguishes between instances where "active consent" is required (federally funded surveys) versus surveys not

---

[14]Under the PPRA, as amended, the school district administering a survey not funded in whole or in part by U.S. Department of Education funds, would have to notify parents by U.S. Mail or by e-mail of the survey and the anticipated dates of administration, as well as provide the parents with the opportunity to "opt out" their children from participation.

[15]"Student Survey Found to Violate Federal Law," *Education Week* (January 9, 2002).

[16]"New Student-Survey Policy Worries Some Researchers," *Education Week* (February 27, 2002).

federally funded that require notification to parents regarding the surveys as well as the opportunity to "opt out" (characterized as "active dissent" and "passive consent"). Public schools, concerned with potential violations for failure to appreciate legislative nuances, will likely employ the more demanding "active consent" requirement, thus limiting the numbers of survey participants.

"Just because the federal government isn't imposing a written-consent requirement doesn't mean that most school districts won't," Patricia C. Kobor, a senior science-policy analyst with American Psychological Association told *Education Week*. "With all this conservative attention on the issue, schools are going to give the benefit of the doubt to parents."

BEING PREPARED: THE BOY SCOUTS AND LITIGATION

Persons seeking recognition or inclusion will sometimes resort to challenges to institutions or organizations that are emblematic of the society they perceive has excluded them. Such challenges often involve litigation. A popular target in recent years has been the Boy Scouts of America. An equally popular supporter has been Congress.

No Boy Scout Left Behind

The Boys Scouts of America were chartered by Congress in 1916 as a non-profit charitable organization charged "to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues, using methods that were in common use by boy scouts on June 15, 1916." 36 U.S.C. § 30902. Congress is still very much involved with the concerns of the Boys Scouts. The No Child Left Behind Act of 2001 (NCLBA) contains the "Boy Scouts of America Equal Access Act," which is designed to ensure the Boy Scouts have equal access to public elementary and secondary schools that have a designated "open forum or a limited public forum" and that such access cannot be denied, *inter alia*, "based on the membership or leadership criteria or oath of allegiance to God and country of the Boy Scouts of America..." 20 U.S.C. § 7905(b)(1).

Congress was reacting to two recent court decisions. In Boy Scouts of America and Monmouth Council *et al.* v. Dale, 530 U.S. 640, 120 S. Ct. 2446 (2000), the U.S. Supreme Court reversed the New Jersey Supreme Court's decision that applied the state's "public accommodations law" to require the Boy Scouts to accept in its membership an avowed homosexual who wished to be an assistant scoutmaster. The U.S. Supreme Court could find no compelling governmental interest that would permit such intrusion into a group's internal affairs by forcing it to accept a member it does not desire, especially where the person's presence affected in a significant way the group's ability to advocate public or private viewpoints. The state law, as applied, was an unconstitutional burden on the organization's First Amendment "freedom of expressive association." The Boy Scouts did not wish to promote

homosexuality, but it would be required to do so if it were required to retain Dale as an Assistant Scoutmaster when he was an avowed homosexual.

The other case of interest to Congress was Boy Scouts of America, South Florida v. Till, 136 F.Supp.2d 1295 (S.D. Fla. 2001). The School Board permitted use of its facilities by numerous organizations and acknowledged it had created a "limited public forum." However, the School Board also had a "non-discrimination policy" (Policy 1341) that prohibited the use of its facilities by any group that discriminates on the basis of "age, race, color, disability, gender, marital status, national origin, religion, or sexual orientation." The School Board permitted the Boy Scouts to use its facilities for a number of years, and even permitted the promotion during school hours of a "School Night for Scouting" event. Because of the Boy Scouts' position regarding membership of homosexuals, as detailed in the Supreme Court's decision in Dale, *supra*, the School Board rescinded its permission to the Boy Scouts to use its facilities. The Boy Scouts complained that this was viewpoint discrimination under the First Amendment and a denial of equal protection under the Fourteenth Amendment. The Boy Scouts sought and obtained an injunction against the School Board. The federal district court noted, as did the Supreme Court in Dale, *supra*, that the Boy Scouts of America is a private, non-profit, national organization founded in 1910 and headquartered in Irving, Texas. The group's mission is to instill the values of the South Oath and Law in its members. The court reprinted both the Scout Oath and the Scout Law.

Scout Oath

On my honor I will do my best
To do my duty to God and my country and
to obey the Scout Law;
To help other people at all times; To keep myself physically strong,
mentally awake and morally straight.

Scout Law

A Scout is . . .

Trustworthy
Loyal
Helpful
Friendly
Courteous
Kind
Obedient
Cheerful
Thrifty
Brave
Clean
Reverent.

136 F.Supp.2d at 1298. The court was dismayed that such a suit had occurred.

> I find this a difficult case for many reasons. At issue are the efforts of public educators, parents, and the members of a private expressive association to prepare young people

> for participation as citizens and to teach the values upon which our society rests. Despite a history of working together, and despite many shared goals, the Boy Scouts and the School Board have reached an impasse over a divisive question, whether homosexuality is a matter of private sexual orientation that should be protected against discrimination or whether it is immoral conduct inconsistent with the values of being "morally straight" and "clean." Such questions might be better left to parents, teachers, and moral and religious leaders. As did [Judge] Learned Hand, I often wonder whether we do not rest our hopes too much upon constitutions, upon laws, and upon courts. With so much common ground, there should be a way for the Boy Scouts and the School Board to find an accommodation. For as Judge Hand also eloquently stated: "[T]he spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women." Address at the "I am an American Day" Ceremony held in Central Park, New York City (May 21, 1944), in *The Spirit of Liberty* (1952).

136 F.Supp.2d at 1297-98. The School Board conceded that it had created a "limited public forum by permitting a broad range of organizations and groups to utilize the School District's facilities for after-hours school use. [The School Board members] also do not contest the claim that Boy Scouts have a First Amendment right of freedom of expressive association, including the right to exclude homosexuals as members or leaders in the organization." The School Board argued, however, that it "has a compelling governmental interest in enforcing its anti-discrimination policy." Id., at 1305. The School Board asserted that it was "protecting the students and teachers (who may wish to be Scout leaders) in the Broward public schools from the emotional harm that would occur from their exclusion from Boy Scout activities on school property solely because of their sexual orientation. The Board also argues that is has a compelling interest in eradicating discrimination so that, by example, their students are taught respect and tolerance." Id., at 1307.

The federal district court agreed that the School Board, in its disapproval of the Boy Scouts' position regarding homosexuality, would be "free to fashion its own message. It need not assist the Boy Scouts in the solicitation of members through 'scouting days' or in any other affirmative acts..." Id., at 1308. "However, in expressing its own message and setting its example for students to follow, the School Board cannot punish another group for its own message. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restrictions." Id.

The court was somewhat dismayed the School Board singled out the Boy Scouts primarily because of the Supreme Court's decision in Dale. Notwithstanding, once the School Board opened a limited public forum, it may not exclude speech or discriminate against speech on the basis of the viewpoint. "Here, the School Board concedes that in allowing a multitude of groups to use its facilities on a regular basis, it has created a limited public forum." Id. The court also addressed the possible "emotional harm" that could

occur because students and teachers might be excluded from the Boy Scouts meeting where they attend school or work.

> It is argued that the Board has a compelling interest in protecting these students and teachers from the emotional harm they might suffer from exclusion. This concern is understandable. The emotional hurt that such an event could cause may be a reason for parents and young men to disassociate themselves from participation in scouting. It may also be a reason for the Boy Scouts to reconsider their policy. But the hurt of exclusion is part of the price paid for the freedom to associate. I do not see how this hurt differs from that of the African-American student whose school gymnasium is used for a Klan rally,[17] the Holocaust survivor forced to contemplate the Nationalist Socialist Party parading through the streets of Skokie, Illinois wearing swastikas,[18] the gays or lesbians who are refused a place in the St. Patrick's Day parade,[19] or James Dale's pain after being excluded from scouting after 12 years of active and honored participation.[20] Freedom of speech and association has its costs, and tolerance of the intolerant is one of them.

Id., at 1310. "[T]he speech the School Board wishes to regulate is not student speech taking place during school hours, but rather the speech of a private organization wishing to exercise its expressive association rights during non-school hours." Id. In addition, the School Board's actions in denying facility access to the Boy Scouts would do "nothing to stop the possible exclusion of students or teachers from scouting. If its purpose is to stop discrimination, the method chosen by the Board is ineffective. Under the law, when government seeks to regulate speech based upon its content, the regulation must achieve the stated governmental purpose, it must be narrowly tailored, and it must be the least restrictive alternative available." The School Board's actions in excluding the Boy Scouts based upon their viewpoint on homosexual members and leaders cannot "pass constitutional muster..." Id., at 1310-11.

The Boy Scouts and "Religious Activity"

Dale and Till, *supra*, have not ended the litigation involving the Boy Scouts. In Powell v. Bunn, 59 P.3d 559 (Or. App. 2002), the plaintiff challenged the recruitment efforts of the Boy Scouts at her son's

---

[17]Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board, 578 F.2d 1122 (5th Cir. 1978).

[18]National Socialist Party of America v. Village of Skokie, 432 U.S. 43, 97 S. Ct. 2205 (1977).

[19]Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557, 115 S. Ct. 2338 (1995).

[20]Boy Scouts of America and Monmouth Council *et al.* v. Dale, 530 U.S. 640, 120 S. Ct. 2446 (2000)

elementary school. The public school district permitted its facilities to be used by a number of groups, including the Boy Scouts. The plaintiff represented that her son was an atheist and, because of this, he could not be a member of the Boy Scouts' organization.[21] The Scout Oath and general scouting principles do require a belief in God, although the organization is otherwise non-denominational. 59 P.3d at 569. The state, under a state law that permits investigations of certain complaints, investigated and issued a report adverse to the plaintiff. She appealed, but the trial court disagreed with her that the Boy Scouts are a religious organization.[22] The Court of Appeals affirmed the trial court.

The recruitment activities at the elementary school were brief and did not involve any proselytizing. The promotional flyers and wristbands provided to interested students did not make any references to religion but were concerned with demonstrating scouting activities and informing parents of scheduled informational Scout Nights. The appellate court noted that the complaint to the State Superintendent of Public Instruction did not allege a constitutional violation; rather, she alleged statutory violations by the school district (in this case, an allegation the school was sponsoring, financially supporting, or actively involved with religious activity in violation of statute). The State Superintendent noted the statute incorporated state constitutional principles and, based upon the three-part analysis from *Lemon v. Kurtzman*, 403 U.S. 602- 612-13(1971) incorporated in a state-court decision, the school district had not violated the statute. The trial court agreed with this analysis, as did the appellate court. Id., at 577. The school district's facility-use/access policy reflected a secular purpose (Id., at 578); the primary effect of the policy neither advanced nor inhibited religion (Id., at 578-79); and the administration of the policy did not excessively entangle the school district with religion (Id., at 581).

The appellate court's decision involves facts that pre-date the NCLBA. It would appear under the NCLBA, the school district's policy–and likely the State Superintendent's decision–would be pre-ordained by the "Boy Scouts of America Equal Access Act" provisions and the facts in this case.

WIRETAPPING, TAPE RECORDINGS, AND EVIDENTIARY CONCERNS

In Recent Decisions 1-12: 1999, the issue of "wiretapping" during an administrative hearing was discussed. The issue arose during the course of a hearing regarding the appropriate educational program for a student with disabilities. In the Matter of K.K., New Prairie United School Corp., and the Indiana Department of Education, 30 IDLER 346 (BSEA 1999), **Article 7 Hearing No. 1062.99**. During the

---

[21]As noted in both Dale and Till, a boy joining the Boy Scouts must take the Scout Oath and agree to obey the Scout Law. The Scout Oath involves a pledge to honor one's duty to God and to country, to help others, and to obey the Scout Law (one aspires to be "trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean, and reverent").

[22]Plaintiff's challenge is primarily under Oregon's constitution, but the constitutional analysis employed by the courts involves mixed federal-state analysis.

initial hearing, the Independent Hearing Officer (IHO) conducted a pre-hearing conference by telephone with the parties. Neither the IHO, the school district, nor the Department of Education (DOE) was aware the student's representatives were tape-recording the pre-hearing conference. Following a three-day hearing, the student appealed to the Board of Special Education Appeals. Attached to the Petition for Review was a cassette tape recording of the pre-hearing conference. The DOE filed a Motion to Strike the tape-recording based, in part, on possible violations of 18 U.S.C. §2501 *et seq.* of Title III, Omnibus Crime, Control and Safe Streets Act (Federal Wiretap Act), as well as Indiana's Interception of Telephonic or Telegraphic Communications Act, I.C. 35-33.5-1 *et seq.* (Indiana Wiretap Act). DOE argued in its motion that the tape-recording should be struck from the record because it was a "surreptitious interception" that the student's representatives should have known violated the law. Ignorance of the law should not be a defense, the DOE added:

> [I]gnorance of the law is no defense in a civil proceeding. *Fultz v. Gilliam*, 942 F.2d 396 (6th Cir. 1991), where the court found a former husband potentially liable for monetary damages to his former wife when he played a tape to his daughter of a recorded telephone conversation between his former wife and her boyfriend. This violated the statute prohibiting disclosure of improperly obtained evidence. The court rejected ignorance of the law as a defense for playing the illegally obtained tape-recorded conversation.

The BSEA did exclude the tape-recording from the administrative appeal but not because of alleged violations of Federal or State Wiretap Laws. Rather, the tape-recording was excluded because no notice was provided to the IHO or the parties that such a recording was going to be made; the student's representatives did not object to either the conduct of the pre-hearing conference or the resulting pre-hearing order, which waives any issues on appeal; and the pre-hearing order is a part of the official record subject to review by the BSEA. The tape-recording was never properly submitted during the initial hearing. As a consequence, it was excluded on appeal.

"Wiretapping," at both the State and Federal levels, continues to generate litigation, although most such disputes center around marital discord and industrial espionage. Since the Recent Decisions' article appeared, there have been two additional important decisions.

Wiretapping Under Indiana Law

In State of Indiana v. Lombardo, 738 N.E.2d 653 (Ind. 2000), the Indiana Supreme Court was asked to determine the constitutionality of Indiana's Wiretap Act, I.C. 35-33.5-1-1 through I.C. 35-33.5-5-6. Lombardo was charged with the unlawful interception of a telephonic communication when he secretly tape-recorded his estranged wife's telephone conversations. Both the Indiana Wiretap Act and the Federal Wiretap Act (18 U.S.C. §§ 2511-2519) forbid the use of wiretapping and electronic surveillance except under certain circumstances. Lombardo had placed a recording device at the home of his estranged wife with the intent to intercept and record telephone conversations she might have with third

parties. After about six months, she discovered the hidden tape recorder wired to the telephones in her home. By that time, Lombardo had several tape-recordings of her conversations. He was charged with a Class C felony under the Indiana Wiretap Act (unlawful interception of a telephonic communication). The trial court dismissed the charge, finding the Indiana Wiretap Act was unconstitutionally vague in that it did not adequately forewarn Lombardo that his conduct was prohibited.

The Indiana Supreme Court did note that the statute has some internal inconsistencies with respect to the degree of culpability to be applied, but this internal inconsistency did not fail to apprise Lombardo that his actions were likely criminal. "[A] person of ordinary intelligence would know, under any reasonable interpretation, that the act of wiring a tape recorder under a house to record secretly another's conversations is an 'intentional' act clearly prohibited under the Act's current statutory scheme." 738 N.E.2d at 656.

The Indiana Wiretap Act is not based on the Federal Wiretap Act, but there are important similarities. "Both provide criminal penalties for the unauthorized interception of a wire or electronic communication without the consent of at least one of the participants." Id., at 658-59. The Federal Wiretap Act permits States to adopt more restrictive legislation, which Indiana has done. However, restrictive Indiana legislation cannot conflict with the Supremacy Clause such that federal activities permitted under the Federal law would be prohibited in Indiana under Indiana law.

Lombardo also attempted to argue that federal case law must be incorporated in analyzing Indiana's law. The primary reason for wishing to do so is that there are differences of opinion among the federal courts as to whether tape-recordings of family members violates the Federal Wiretap Law.

> In holding that the Indiana [Wiretap] Act does not incorporate by reference federal case law on intercepting the telephone communications of one's spouse within the marital home, we note that we have not been asked to express any opinion, and we do not, as to whether the wiretapping at issue in this case occurred in the marital home or as to whether there is a marital home exception implicit in the Indiana Wiretap Act.

Id., at 659-60. The Supreme Court found that the Indiana Wiretap Act "is sufficiently clear and definite to warn a person of ordinary intelligence that the act of intentionally wiring a hidden tape recorder to document the private telephone conversations between a spouse and third-parties, without their knowledge or permission, is prohibited under the Act [.]" Id., at 660..

But even people "of ordinary intelligence" can find ways to complicate basic applications of the Indiana Wiretap Act. Apter v. Ross, 781 N.E.2d 744 (Ind. App. 2003) involved a custody dispute between the former wife and husband regarding their two children. In the eventual hearing, the husband introduced a transcript of a recorded conversation between his former wife and one of the children wherein the mother appears to be coaching the child as to the testimony she should give in the forthcoming hearing. The trial

court determined the transcript was inadmissible under the Federal Wiretap Act.[23] The husband argued that the transcript should have been admissible because the recording was made on his phone, he had joint custody of the children at that time, and he had the power to consent, on his minor child's behalf, to the recording of her telephone conversation, even though the conversation was with the child's mother.

The Indiana Court of Appeals agreed, noting that the father sufficiently stated a basis for his recording of his child's telephone conversation. Although, as noted in Lombardo *supra*, the Circuit Courts of Appeal are divided on the issue as to whether the Federal Wiretap Act applies to recordings in the marital home, the 7th Circuit Court of Appeals has not adopted a position, other than to note there is a division. Nevertheless, in Scheib v. Grant, 22 F.3d 149, 154-55 (7th Cir. 1994), the court found: "We cannot attribute to Congress the intent to subject parents to criminal and civil penalties for recording their minor child's phone conversations out of concern for the child's well-being." In short, then, it is the parent's motivation and not the actual well-being of the child that is important in determining whether the Federal Wiretap Act has been violated. 22 F.3d at 155.

With regard to this case, the Indiana Court of Appeals looked to the actual motivation of the husband in recording the conversation.

> While the trial court is correct that the evidence did not establish that [the child] was actually distressed by the phone conversation with her mother, the evidence demonstrates that [the husband's] concern for his daughter's welfare was supported by [the child's] appearance and actions while she was on the phone with her mother. As it is a parent's motivation and not the child's actual well-being that is important in determining the applicability of the extension telephone exemption, we conclude that the facts in this case establish that [the husband's] concern for his child was his purpose in taping the phone conversation. Therefore, we hold that the tape recording does not violate the Federal Wiretap Act.

781 N.E.2d at 755. The appellate court also found the husband did not violate the Indiana Wiretap Act. Although "interception" under I.C. 35-33.5-1-5 includes the "intentional...recording of...or acquisition of the contents of...a telephonic or telegraphic communication by a person other than a sender or receiver of that communication, without the consent of the sender or receiver...[,]" a parent does have the right, under I.C. 29-3-3-3, to consent on behalf of his or her minor child to the recording of that child's phone conversations "unless otherwise curtailed in some legal proceeding." Id., at 756. The husband was not "otherwise curtailed" by a "legal proceeding" at the time of the conversation and, accordingly, could consent to the recording on behalf of his child. Id., at 756-57. The appellate court cautioned against reading this decision as authorizing such surreptitious activities.

---

[23]The mother moved to Missouri after her divorce from the children's father. He continued to reside in Marion County, Indiana.

> [W]e caution that this type of unilateral action taken by a parent with joint legal custody, while legally authorized in certain situations, is anathematic to a successful joint custody arrangement and can be evidence that joint custody is not in the best interests of the child.

Id., at 757, *n.* 2.

Admissibility of Tape Recordings as Evidence

The Apter v. Ross case also contained an important discussion regarding the admissibility of tape recordings as evidence. The offering of tape recordings are not uncommon, especially in administrative due process proceedings. Oftentimes, however, the tape recordings are offered without a transcript, without any authentication as to the date made and by whom, without any means to ensure the tape recording is a correct and complete recording of the event, whether the parties were aware of the tape recording, and often barely intelligible. Under Lamar v. State, 282 N.E.2d 795, 800 (Ind. 1972), the Indiana Supreme Court established five foundational requirements for the admission of a tape recording into evidence:

1. That it is authentic and correct;
2. That the testimony elicited was freely and voluntarily made, without any kind of duress;
3. That all required warnings were given and all necessary acknowledgments and waivers were knowingly and intelligently given;
4. That it does not contain matter otherwise not admissible into evidence; and
5. That it is of such clarity as to be intelligible and enlightening to the jury.

The Supreme Court later clarified that requirements (2) and (3) would apply only where a custodial interrogation has occurred. Bryan v. State, 450 N.E.2d 53, 59 (Ind. 1983).

> We see no reason why the admission of a tape recording in a civil case would have a stricter test than the admission of tape recording in a criminal cases that does not involve a custodial interrogation. Therefore, we find that, in civil cases, a tape recording is admissible if only these three foundational requirements are met: (1) that it is authentic and correct; (2) that it does not contain matter otherwise not admissible into evidence; and (3) that it is of such clarity as to be intelligible and enlightening to the jury.

Apter v. Ross, 781 N.E.2d at 752-53. For administrative law purposes, the clarity would have to be such that the recording is "intelligible and enlightening" to the Administrative Law Judge rather than a jury.

Wiretapping under Federal Law

In the article that appeared in Recent Decisions 1-12: 1999, the case of Peavy v. Dallas Independent School District, 57 F.Supp.2d 382 (N.D. Tex. 1999) was discussed. Peavy had been a member of the

school's Board of Trustees. An anonymous person sent a tape to other board members that contained intercepted conversations between Peavy and others wherein Peavy used a number of racial slurs and epithets, as well as demeaning remarks about fellow board members and potential candidates for the board. School district personnel transcribed the tape and provided the transcript to board members, who then read it into the board's record. The transcript was subsequently provided to the media. Peavy resigned his position, but he also sued the board claiming violations of the Federal Wiretap Act. The trial court disagreed. To prevail, the court stated, Peavy would have had to show that the board members knew they were disclosing or using information from an intercepted communication, and that the board members knew the parties to the intercepted communication had not consented to the interception (a "disclosure and use" claim). 18 U.S.C. §2511(1)(c),(d). Peavy never told the board, prior to the board's disclosure, that the tape contained illegally intercepted communications, nor did he indicate that he thought the board members were aware the communications had been illegally obtained prior to the board's disclosure.[24]

Peavy also initiated a number of other lawsuits. In Peavy v.WFAA-TV, Inc., 221 F.3d 158 (5th Cir. 2000), he sued a television station that received copies of his taped conversations from his next-door neighbor. Although the television station did not broadcast any of the tapes, its investigative series was based substantially upon the content of the tapes. The federal district court found that, since the television station had obtained the tapes legally, the First Amendment would apply to prevent any sanctions against the media outlet. The 5th Circuit disagreed and reversed the district court's decision. The court also noted the television station participated in the interceptions at issue.

The U.S. Supreme Court has since weighed in on the issue of First Amendment rights vis-a-vis the Federal Wiretap Act. Bartnicki v. Vopper, 532 U.S. 514, 121 S. Ct. 1753 (2001) grew out of contentious collective-bargaining negotiations between a Pennsylvania teacher's union and a public school district. The continuing impasse was a matter of both public interest and concern. Two high-level union members had a lengthy telephone conversation via cellular phone during which they discussed the status of negotiations, possible tactics to address the school board's intransigence, and the likelihood of a teacher strike. This conversation was intercepted and taped by a person unknown. This person put a copy of the tape in the mailbox of a leader of a local taxpayers' organization (Yocum), who was opposed to the union's demands. Yocum played the tape for the local school board and then gave the tape to a local radio commentator (Vopper) who was likewise critical of the union. Vopper played the tape as a part of his public affairs talk show. Other media outlets also broadcast the tape or published its contents. Although the persons disclosing the intercepted cellular telephone conversations did not participate in the activity, they knew–or had reason to believe–the intercepted conversations were not obtained legally. However, they obtained the tape recording legally. The Supreme Court was faced with deciding the following narrow issue:

---

[24]As it turned out, the telephone conversations (188 in all) had been illegally intercepted and recorded by Peavy's next-door neighbor. Peavy v. Harman, 37 F.Supp.2d 495 (N.D. Tex. 1999).

> Where the publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?

532 U.S. at 528. The Supreme Court accepted that the interception was intentional and, therefore, unlawful, and that Vopper *et al*. had reason to believe the interception was unlawful. At this juncture, "the disclosure of the contents of the intercepted conversation by Yocum to school board members and to representatives of the media, as well as the subsequent disclosures by the media defendants to the public, violated the federal and statute statutes." 532 U.S. at 525.

However, three factual matters serve to distinguish this case: (1) The defendants played no part in the illegal interception, nor did they learn the identity of the person who did so; (2) Their access to the information on the tapes was obtained lawfully even though the information itself was intercepted unlawfully by someone else; and (3) The subject matter of the conversation was a matter of public concern. Id.

The majority acknowledged the Federal Wiretap Act is a content-neutral law of general applicability with a basic purpose to protect the privacy of communications. Id., at 526. However, "this Court has repeatedly held that if a newspaper lawfully obtains truthful information about a matter of public significance, then state officials may not constitutionally punish publication of the information , absent a need of the highest order." Id., at 527-28 (citations and internal punctuation omitted). The more notable case for this proposition was New York Times Co. v. United States, 403 U.S. 713, 91 S. Ct. 2140 (1971), which involved the publication of the contents of a classified study entitled "History of U. S. Decision-Making Process on Viet Nam Policy," more commonly referred to as "The Pentagon Papers." In New York Times, "the Court upheld the right of the press to publish information of great public concern obtained from documents stolen by a third party. In so doing, that decision resolved a conflict between the basic rule against prior restraint on publication and the interest in preserving the secrecy of information that, if disclosed, might seriously impair the security of the Nation." 532 U.S. at 528. The Supreme Court did not answer then–and pointedly would not answer in this case–whether such publication would be protected under the First Amendment if the media had participated in the unlawful interception of the communications.

In this case, "We think it is clear that parallel reasoning requires the conclusion that a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern. The months of negotiations over the proper level of compensation for teachers at the Wyoming Valley West High School were unquestionably a matter of public concern, and respondents were clearly engaged in debate about that concern." 532 U.S. at 535.

In another recent case, a female medical resident claimed that other residents were intentionally eavesdropping on her telephone conversations by using an extension telephone. She sued the hospital, claiming violations of the Federal Wiretap Act, 18 U.S.C. §2520, seeking to hold the hospital

vicariously liable for the residents' actions. The federal district court dismissed the action, and the 4th Circuit Court of Appeals agreed. Any such allegedly illegal acts would have been outside the scope of employment for the residents. The plaintiff failed to present any credible, admissible evidence. Adams-Sow v. Medical College of Hampton Roads, 30 Fed. Appx. 126 (4th Cir. 2002).

COURT JESTERS: *BUTTERFLIES ARE FREE*

Well, not exactly. A Park Ranger in Oregon apparently thought the phrase was "Butterflies are Fee."[25] A man visiting the Rim Village of Crater Lake National Park along with his son had to pay $50.00 once for depriving a butterfly of its freedom until a federal district court judge dismissed the charge, but not without comment and cartoons.

In United States v. Sproed, 628 F.Supp. 1234 (D. Oregon 1986), federal District Court Judge James M. Burns began his dissertation with an apology of sorts:

> Judges seldom get a chance to wax lyrical. Rarer still does a judge have an opportunity to see a case centered around a butterfly. Those who read this opinion will, therefore, recognize that this case presented me with a temptation which I obviously could not resist.

Id. Judge Burns did more than "wax lyrical." He waxed the Park Ranger as well. Sproed and his son were at Rim Village. Both are avid collectors of Lepidoptera, and were actively engaged in this endeavor. "Along came a Park Ranger who had apparently taken keenly to heart the 'Law and Order' rhetoric which some say has been a hallmark of the current administration.[26] Responding to this Petty Offense, the Ranger issued to Sproed what became enshrined in judicial records as Citation P127482." Id., at 1235.

Citation P127482 charged Sproed with "Destruction of Natural, Cultural and Archeological Resources," specifically possessing or disturbing wildlife in its natural state. The Judge believed "[t]he Park Ranger may have been on shaky legal as well as entomological grounds," especially as insects are not considered "wildlife." Id., at 1236, *n.* 4.

"It would be surprising," Judge Burns wrote at 1235, "to find that most of our citizens would be embittered if accused of such a heinous crime." He theorized Sproed and his son were likely "moved

---

[25]The title for this article is derived from Bleak House by the English novelist Charles "Boz" Dickens ("I only ask to be free. The butterflies are free. Mankind will surely not deny to Harold Skimpole what it concedes to the butterflies!"). The title does **not** come from the 1972 movie *Butterflies Are Free*, starring Goldie Hawn and and Edward Albert.

[26]The Butterfly Caper occurred on August 25, 1985.

by the somewhat same poetic spirit as the 'aged, aged man' invented and immortalized by Lewis Carroll:

> I saw an aged, aged man,
> A-sitting on a gate.
> 'Who are you, aged man?' I said,
> 'And how is it you live?'
> And his answer tickled through my head
> Like water through a sieve.
> He said, 'I look for butterflies
> That sleep among the wheat:
> I make them into mutton-pies,
> And sell them in the street.'

Id.[27] "Or, perhaps, was being influenced by German poet and literary critic Heinrich Heine (1797-1856):

> With the rose the butterfly's deep in
> love,
> A thousand times hovering round;
> But round himself, all tender like gold,
> The sun's sweet ray is hovering found.

Id. "Mr. Sproed may even have been mulling over the lines written by Oregon's own 'poet,' Joaquin Miller:

> The gold-barr'd butterflies to and fro
> And over the waterside wander'd and wove
> As heedless and idle as clouds that rove
> And drift by the peaks of perpetual snow."

---

[27] Through the Looking Glass, Chpt. 8. "Lewis Carroll" is the pseudonym of English mathematician, cleric, and writer Charles Lutwidge Dodgson.

Id.[28] In any case, Sproed wrote a letter, complaining of the charge and the fine. "The park ranger," Sproed wrote to the court, protesting his innocence, "spent about 30 minutes on his C.B. and looking through his book but never did find anything against collecting insects... It never entered my mind that it was unlawful to catch a butterfly in the park. We saw no signs and there was nothing even hinting at such a thing in the paper given to us when we entered the park... It does state that it is o.k. to catch fish." Id., at 1237, Appendix A.

Judge Burns "became aware, shortly afterward, of this case of lepidopteral *lese majeste.* I chose to exercise my supervisory power as a District Judge to review the ruling of the Magistrate...," who had earlier dismissed the matter. Judge Burns agreed that dismissal in Sproed's favor served the interests of justice. The Magistrate, "the sharp-eyed young lady in the Clerk's office and I have now done our bit," he wrote at 1236. "Restoring the younger Sproed's respect–if this will help somewhat in achieving that worthy aim–seems, somehow, a fitting way to close the year 1985. It is a small victory, perhaps, but well worth the effort."

However, the Judge didn't stop there. Declaring the Sproeds' experience as exemplifying "the axiom, 'Nature Imitates Art,'" he reprinted a comic strip panel from "Bloom County," with his own artwork added.[29] The Judge is better at drawing conclusions.

QUOTABLE . . .

> Legislatures are not grammar schools, and in this country, at least, it is hardly reasonable to expect legislative acts to be drawn with strict grammatical or logical accuracy.
>
> Chief Justice of the Michigan Supreme Court Isaac P. Christiancy, People *ex rel.* Whipple v. Judge of Saginaw Circuit, 26 Mich. 342, 344-45 (1873), cautioning against a literal

---

[28]Judge Burns warned that he would "wax lyrical," and he did. He also included a poem, "To A Butterfly," by English poet William Wordsworth. See Id., at 1236, *n.* 4. Exception must be taken, however, to Judge Burns' reference to Joaquin Miller as "Oregon's own." He was not. Joaquin Miller is the pseudonym of Cincinnatus Miller (1839-1913), who was actually born in Liberty, Indiana, and lived there for a number of years before trekking westward, changing his name, and affecting a decidedly western "air."

[29]Unfortunately, we were not granted permission to reprint the comic strip. It can be viewed as Appendix B to the court's decision, 628 F.Supp. at 1237.

interpretation of a Michigan statute that would provide an absurd result.

UPDATES

The Pledge of Allegiance

In "The Pledge of Allegiance in Public Schools," **Quarterly Report** July-September 2001, Dana L. Long, Legal Counsel, detailed the history of the Pledge from its creation by Francis Bellamy in 1892 through the judicial and legislative treatments since then. Although the words "under God" were not added to the Pledge until Congress did so in 1954, no serious First Amendment Establishment Clause issues were raised in any quarter until recently. Even the U.S. Supreme Court, in *dicta*, seemed not to be concerned with an Establishment Clause problems.

Last summer, a three-judge panel of the 9th U.S. Circuit Court of Appeals issued a 2-1 decision (*Newdow I*) finding the Pledge, as presently written, did violate the Establishment Clause. See "The Pledge of Allegiance," **Quarterly Report** July-September 2002. The decision was stayed until the full 9th Circuit Court of Appeals could decide whether to review the matter.

On February 28, 2003, the 9th Circuit Court of Appeals declined to review *en banc* the decision of the three-judge panel that determined (2-1) the recitation of the Pledge of Allegiance, in its current form with the words "under God," violates the Establishment Clause of the First Amendment. Newdow v. U.S. Congress *et al.*, 321 F.3d. 772 (9th Cir. 2003). The majority opinion (*Newdow II*) has been revised to apply this ruling only to the recitation of the Pledge in public schools within the 9th Circuit: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington (as well as Guam and the Northern Marianas). The dissenting opinion was revised accordingly. The 9th Circuit decision directly conflicts with the 7th Circuit's decision in Sherman v. Community Consolidated School Dist. 21 of Wheeling Township, 980 F.2d 437 (1992).

One of the two members responsible for the majority opinion in *Newdow I* and *II* wrote an opinion concurring with the order denying rehearing *en banc*. However, the tone of the concurring opinion is defensive and occasionally caustic, especially towards those members of the 9th Circuit dissenting from the denial of rehearing. Justice Stephen Reinhardt asserts that *en banc* rehearing should only occur when a case is (1) of exceptional importance, and (2) in need of correction. Needless to say, he does not believe that there is any need for correction. He does not stop there. He demeans the principal author of the dissenting opinion as harboring "a serious misconception of fundamental constitutional principles and the proper role of the federal judiciary." 321 F.3d at 773. He also referred to the dissenting opinion as "disturbingly wrongheaded." Id., at 775.

The dissenting opinion, authored by Circuit Judge Diarmuid O'Scannlain, rejoins Judge Reinhardt's accusations:

> We should have reheard *Newdow I* en banc, not because it was controversial, but because it was wrong, very wrong–wrong because reciting the Pledge of Allegiance is simply not "a religious act" as the two-judge majority asserts, wrong as a matter of Supreme Court precedent properly understood, wrong because it set up a direct conflict with the law of another circuit, and wrong as a matter of common sense.

Id., at 776. Judge O'Scannlain then lays out an impressive array of arguments against the majority's decision as well as potential repercussions (*Newdow* decision would prohibit recitation of the Constitution, the Declaration of Independence, the Gettysburg Address, the National Motto, and the singing of the National Anthem). Judge O'Scannlain also provided a brief but succinct overview of Supreme Court "school prayer" cases that recognizes patriotic and ceremonial occasions will sometimes involve the recitation of historical documents that reference a Deity or sing "officially espoused anthems" that contain the author's profession of faith in a Supreme Being. Id., at 778-79, quoting from Engel v. Vitale, 370 U.S. 421, 435, *n.* 21, 82 S. Ct. 1261 (1962). Supreme Court *dicta* regarding the Pledge of Allegiance is also discussed. The dissent distinguishes the "indirect coercion" effect employed by the two-judge majority (the dissent always refers to the majority opinion as such even though, with the denial of rehearing *en banc*, the decision is now officially the opinion of the 9th Circuit). There is no "indirect coercion" applying the analysis of Lee v. Weisman, 505 U.S. 577, 112 S. Ct. 2649 (1992). The recitation of the Pledge is not "the performance of a formal religious exercise" in such a way as to oblige the participation of objectors. 321 F.3d at 782, citing Lee, 505 U.S. at 586. Rather, "to pledge allegiance to flag and country is a *patriotic* act." Id. (emphasis original).

The dissent poses a number of rhetorical questions, asking whether Newdow's constitutional rights are violated when his daughter is told not to attend school on Thanksgiving or Christmas. Also, "[m]ust school outings to federal courts be prohibited, lest the children be unduly influenced by the dreaded intonation 'God save these United States and this honorable Court'?"

> A theory of the Establishment Clause that would have the effect of driving out of our public life the multiple references to the Divine that run through our laws, our rituals, and our ceremonies is no theory at all.

Id., at 783-84. The dissent warns that "the Supreme Court has gone out of its way to make it plain that the Pledge itself passes constitutional muster," although this has occurred in *dicta* and not actual holdings on this issue. Id., at 784, with citations collected. The majority should not be dismissive of such *dicta*. "[D]icta of the Supreme Court have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold. We should not blandly shrug them off because they were not a holding." Id., at 785, quoting Zal v. Steppe, 968 F.2d 924, 935 (Noonan, J., concurring and dissenting in part). Judge Fernandez, in his opinion concurring and dissenting to *Newdow II*, also

addressed the dismissive attitude of the two-judge majority opinion by quoting from the 7th Circuit's contrary holding in Sherman, 980 F.2d at 448:

> Plaintiffs observe that the [Supreme] Court sometimes changes its tune when it confronts a subject directly. True enough, but an inferior court had best respect what the majority says rather than read between the lines. If the Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the [Supreme Court] Justices are just pulling our leg, let them say so.

Judge O'Scannlain and the other dissenting judges demonstrate some antipathy towards Newdow himself. "In affording Michael Newdow the right to impose his views on others, *Newdow II* affords him a right to be fastidiously intolerant and self-indulgent. In granting him this supposed right, moreover, the two-judge panel majority has not eliminated feelings of discomfort and isolation, it has simply shifted them from one group to another." 321 F.3d at 785.[30]
Although the Supreme Court's various "tests" for Establishment Clause analysis have been criticized, even by the Supreme Court itself, the court has "displayed remarkable consistency" in that "patriotic invocations of God simply have no tendency to establish a state religion." At Id., at 786. It is fiction to pretend that American history and its people are devoid of religious contexts. *Newdow II*, the dissenting judges argue, "adopts a stilted indifference to our past and present realities as a predominantly religious people." Id.

> But *Newdow II* goes further, and confers a favored status on atheism in our public life. In a society with a pervasive public sector, our public schools are a most important means for transmitting ideas and values to future generations. The silence the majority commands is *not* neutral–it itself conveys a powerful message, and creates a distorted impression about the place of religion in our national life. The absolute prohibition on any mention of God in our schools creates a bias *against* religion. The panel majority cannot credibly advance the notion that *Newdow II* is neutral with respect to belief versus non-belief; it affirmatively favors the later to the former. One wonders, then, does atheism become the default religion protected by the Establishment Clause?

Id. (emphasis original).

On March 4, 2003, the 9th Circuit issued a stay of its decision pending appeal to the U.S. Supreme Court. This likely will serve best the affected public school districts by preventing, for the time being, the use of the public schools as the battle ground for conflicting ideologies. If recitation of the Pledge of

---

[30]One is mindful that Newdow creates much of the antipathy towards himself and apparently enjoys the negative attention. This, in turn, reminds one of Justice Felix Frankfurter's observation in his dissenting opinion to United States v. Rabinowitz, 339 U.S. 56, 69 (1950): "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people."

Allegiance is a religious act, then it is likely a "prayer." If so, then a public elementary and secondary school could not prevent a student from reciting the Pledge, as amended by Congress in 1954 to include "under God." 20 U.S.C. § 7904 (No Child Left Behind Act of 2001). But a teacher could not lead students in the recitation. It also becomes likely that others would accuse the public schools of encouraging students to recite the Pledge, which, in turn, would lead to the plethora of litigation similar to the never-ending "graduation speech" disputes. The 9th Circuit's stay order avoids, for the time being, this realistic scenario.

U.S. Solicitor General Theodore Olson, on behalf of the Bush Administration, filed on April 30, 2003, a petition with the U.S. Supreme Court, seeking to reverse the 9th Circuit's decision.

Date: _____

_____
Kevin C. McDowell, General Counsel
Indiana Department of Education

The **Quarterly Report** and other publications of the Legal Section of the Indiana Department of Education can be found on-line at <www.doe.state.in.us/legal/>.

Index for Quarterly Report
Through October – December 2002

Legend

J-M (January-March)
A-J (April-June)
J-S (July-September)
O-D (October-December)

Updated: June 12, 2003